

In order to obtain a certificate of appealability, a habeas Petitioner must make a

substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (C)(2). There is a difficulty in applying this test when the Court does not address the constitutional issues raised but decides the habeas petition based on a procedural issue such as mootness, as is the case herein.

Slack v. McDaniel, 529 U.S. 473 (2000); Walker v. Government of The Virgin Island, 230 F.3d 82, 89-90 (3d Cir. 2000). In resolving this difficulty, the Supreme Court in Slack v. McDaniel, held that

[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. at 484. Hence, the analysis as to whether a certificate of appealability should issue to review a procedural question, has “two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding.” Id. at 473. The test is conjunctive and both prongs must be met. See Walker v. Government of the Virgin Islands, 230 F.3d at 90.

Applying this standard to the instant case, the Court concludes that jurists of reason would not find it debatable whether dismissal of the Petitioner's claims because they are moot was correct and that jurists of reason would not find it debatable that refusing to address the DNA issue based on it not being cognizable in habeas was correct . Having found the one prong unmet, the Court need not address the other prong of whether jurists of reason would find it debatable whether petitioner's claims state a valid claim of a denial of a constitutional right.

Accordingly, **IT IS ORDERED** that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Report and Recommendation (Dkt. [73]) of Magistrate Judge Hay, filed March 15, 2007, is adopted as the opinion of the court.

May 14, 2007

A handwritten signature in black ink, appearing to read "Kim R. Gibson". The signature is written in a cursive, flowing style.

The Honorable Kim R. Gibson
United States District Court Judge

cc: Hon. Amy Reynolds Hay
United States Magistrate Judge

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